BRIEFING

PERSONAL INJURY

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INTRODUCTION

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It has been a strange summer yet all too soon the nation is deflating paddling pools, spending the national debt of a small country in shoe shops and fervently sewing on name tapes as September and a new academic and then legal year approach. We hope many of you have managed some sort of break from home working / living at work despite all the difficulties with travel this summer. We were particularly tickled when one of our clients suggested setting an "out of spare room" autoreply on his email, rather than "out of the office".

The personal injury team at 1CL thought we would ease you into the new season with an update on some recent developments and cases that we hope will provide a welcome distraction from shortening days and the "new normal", whatever that is...

Thomas Yarrow considers insurance requirements for escooters and ebikes and the debate within the insurance industry that this is provoking.

Roderick Abbott provides a useful analysis of the recent High Court appeal in the case of *Pegg v Webb* [2020] EWHC 2095 (QB) in which Martin Spencer J considered fundamental dishonesty in a case with inconsistencies in the facts of a sort that the County Courts deal with day in day out.

Christopher Pask discusses the case of *Holmes v S&B Concrete* [2020] EWHC 2277 (QB) which dealt with the tricky question of the effect of restoring a company to the register on limitation and is a decision that all personal injury practitioners need to be aware of.

Members of 1 Chancery Lane continue to offer our full range of services adapted to meet the challenges of the Covid pandemic. We are working towards a safe return to Chambers in due course but continue to work remotely in the meantime.

We have been running weekly webinars, all of which you can view on our YouTube channel. As ever both members of 1 Chancery Lane and our hugely experienced clerking and professional support team are here to assist with any of your legal queries. If you have any questions please don't hesitate to get in touch with us at clerks@1chancerylane.com

ARE E-SCOOTERS THE UNLIKELY BENEFICIARY OF THE CORONAVIRUS PANDEMIC?

THOMAS YARROW

With a significant amount of focus on travel corridors, school openings, 'eat out to help out', furloughs and facemasks, one might be forgiven for having missed one catchily named piece of secondary legislation in the Coronavirus canon - The Electric Scooter Trials and Traffic Signs (Coronavirus) Regulations and General Directions 2020. This instrument was laid before Parliament by the Under Secretary of State for Transport on 30 June of this year and came into force only four days later.

Responding to restrictions in public transport capacity caused by the public health emergency, the Government brought forward planned trials for the use of electronic scooters ("e-scooters") on public roads. In doing so, it amended various pieces of legislation to relax the stringent rules on licencing, registration, helmets, training etc. which had previously governed the use of such vehicles, and had effectively made them illegal everywhere but on private land. Importantly, the scope of this liberalisation was limited only to rental e-scooters being used as part of official trials hosted by local authorities.

One area where the law was not relaxed, however, was on the classification of the trial e-scooters. They continue to be classed as 'motor vehicles', with that label carrying with it all the associated mandatory provisions relating to holding a licence, registering for tax, and holding third party liability insurance; this last governed by Article 3 of the Motor Insurance Directive (2009/103/EC) and Part VI of the Road Traffic Act 1988.

On first glance at the Directive and the 1988 Act the classification is uncontroversial. By Article 1 of the former, vehicles within scope are defined as "*any motor vehicle intended for travel on land and propelled by mechanical power*" (though not trains); by section 185(1) of the latter, 'motor vehicle' is defined as "*a mechanically propelled vehicle intended or adapted for use on roads*".

Even though such a definition is imperfect at its boundaries (with the word 'mechanical' in a Newtonian world arguably encompassing almost anything with wheels), it is clear that an electric motor powered e-scooter falls squarely within both descriptions.

The position is murkier, however, for electrically assisted pedal cycles ("EAPCs"). These, in the UK and many EU27 Member States such as the Netherlands, are not treated as motor vehicles and not subject to the same mandatory insurance requirements. Domestically in the UK, section 189(1) of the 1988 Act and section 140 of the Road Traffic Regulation Act 1984 expressly exclude EAPCs from the regime (along with lawnmowers). Although to some extent mechanically propelled, these are "*to be treated as not being a motor vehicle*". Currently in the UK, there is therefore an imbalance between the rules for EAPCs and e-scooters; this despite the explanatory note to the 2020 Regulations stating "*[t]he typical size and design of e-scooters makes them most similar to electrically assisted pedal cycles*".

On the European side, there has been for the last few years some jostling over whether the Directive does and/or should cover EAPCs and e-scooters. In May 2018, the Commission tabled a proposal for a revision of the Directive. According to that document, an impact assessment on how 'future-proof' the Directive was, had explained "*new types of motor vehicles, such as electric bicycles, segways, electric scooters* ***already fall within the scope of the Directive***" (my emphasis). The Commission's view was that the definition of 'motor vehicle' already covered such vehicles, and therefore unless a Member State had specifically derogated from the Directive for e-bikes, then third party insurance would be mandatory; this despite the fact that the Commission's type-approval regulations for motor vehicles did not cover EAPCs. When the Commission's proposal reached the European Parliament in early 2019, the IMCO committee returned a report saying that the Directive should not cover EAPCs, segways and e-scooters. In their view, they were lighter and travelled at lower velocities, and were therefore less likely to cause significant third-party damage to persons or property. They proposed a new recital to the Directive which read (in part) "*It is therefore necessary to limit the scope of Directive 2009/103/EC to those vehicles for which the Union considers that there*

need to be safety and security requirements before those vehicles are placed on the market, i.e. the vehicles subject to an EU type-approval". When Coreper met in December of last year, the position of the Member States was confirmed: the revision to the Directive should ensure that vehicles which were lighter than 25kg or travelled at slower speeds than 25km/h should specifically be excluded (these limits in line with EU type-approval regulations).

This has created a rather confused picture of the law as it currently stands. As unpopular as the Commission's May 2018 press release proved, the definition in the current Directive, putting 'mechanical propulsion' at the heart of vehicles in scope, on a strict reading **does** include EAPCs, and it won't be until the new Directive is adopted that these will be expressly excluded. In the meantime, Member States are relying on the fact that EU type approval regulations do not encompass EAPCs as an interpretative aid to the wording of the Directive. Otherwise there would suddenly be a wealth of criminality across Europe. As an interesting aside, however, were the position litigated in the UK there is an arguable claim that while the UK is bound by EU law, the Road Traffic Act 1988 by excluding EAPCs is non-compliant with the Directive, which as confirmed by the case of *Motor Insurance Bureau v Lewis [2019] EWCA Civ 909* in the Court of Appeal last year could give rise to an action against the Motor Insurance Bureau ("MIB") as an emanation of the State under EU law, if a third party were injured by an uninsured EAPC.

Whatever the position on e-bikes, with regard to e-scooters the MIB have taken the view that these are currently in scope of the Directive. Indeed, e-scooters with a saddle do in fact fall under EU type approval regulations and need to be approved as 'L1e-B mopeds'. In a statement earlier this month, the MIB decried that the UK's "*failure to implement relevant EU law since 2014 has left the MIB bearing the costs for compensating victims who are hit by e-scooters*".

Certain groups are taking an obvious interest in the progress of the current trials and the future of any insurance regime. The MIB in their statement have come out very much in favour of compulsory insurance for e-scooters, saying:

> *The MIB believes there are potentially catastrophic consequences for legalising e-scooters beyond these trials without the requirement for some form of compulsory insurance. There is a high risk of accidents – presenting a dangerous threat to the safety and security of pedestrians, children and other innocent road users. This increases the likelihood of victims enduring life-threatening and life changing consequences with no hope of compensation for the victims. This also poses a major risk to e-scooter users without insurance, who could be forced to pay out thousands of pounds in liability if they have an accident.*

On the other hand, the International Underwriting Association have voiced against compulsory insurance for e-scooters. They recommended in submissions to the Parliamentary Transport Committee that the market be allowed to develop naturally and come up with its own solutions. In their view, with insurance not being required for bicycles it would be disproportionate to require it for e-scooters.

From 31st December onwards, it would be open for the UK to take any one of three approaches following the trial phase: (1) to class both e-scooters and EAPCs as motor vehicles and require operators to have third party liability insurance; (2) to exclude both categories of vehicle from the mandatory insurance regime, (in line with the proposed revision to the Directive) and indeed to close off a route to the MIB for compensation for injuries from these vehicles; (3) to maintain the current situation in which e-scooters are in, and EAPCs are out of the mandatory insurance regime.

There is no incoherence in taking this last option. A case by case approach which examines each instance of emerging technologies in its own right, and on its own evidence, may seem inefficient but probably gains more than it loses in providing effective, bespoke regulation. In civil liberties terms, a mandatory insurance regime represents a state interference with personal freedoms and should accordingly be justified as a proportionate measure to prevent an identified harm; in purely economic terms, it is a market interference with a high distorting potential which should be considered against its objectives. If the objective is to get more people using greener modes of transport, having a regime which makes adoption harder is likely to frustrate that objective.

If the evidence presents a picture as bad as the MIB's statement fears with risks of life threatening and life-changing consequences, then compulsory insurance is likely appropriate. Conversely, if the risk of serious injuries or large liabilities to compensate are significantly smaller, it is likely disproportionate. The trial phase provides an opportunity to collect and evaluate such evidence. So far, the evidence from other European countries seems to show that, as with bicycles, the party most likely to be injured is the rider of the e-scooter themselves (certainly when it comes to fatal accidents) and not a third party.

Will a post-coronavirus world see us all zipping (at 15.5mph) down cycle lanes to court on our e-scooters (trailing our suitcases behind us)? Time will tell, but I for one have my fingers crossed for a successful set of trials.

DON'T FORCE SQUARE PEGGS INTO ROUND HOLES: – AN IMPORTANT NEW CASE ABOUT FUNDAMENTAL DISHONESTY

RODERICK ABBOTT

Introduction

Martin Spencer J has done it again. He has previously handed down two of the most frequently-cited judgment in personal injury cases where fraud or exaggeration are alleged (*Molodi* and *Richards*). He has now completed the "trilogy" with *Pegg v Webb* [2020] EWHC 2095 (QB).

The facts in Pegg

Pegg arose from what seemed to be a fairly typical road traffic accident., The defendant alleged that the accident did not happen or had been contrived between the parties; but as a secondary allegation it contended that, if the accident did occur, the claimant had so exaggerated his injuries and so misled the medical expert that his claim was fundamentally dishonest and fell to be dismissed on that basis.

Mr Pegg did not attend his GP following the accident, or a walk-in centre or A&E department. He did, however, undergo a course of physiotherapy arranged by his solicitors.

A month after the accident he had a fall involving his quad bike, and a few days after that he experienced back and left leg pain when lifting the quad bike. He attended hospital two days after the onset of that pain. The note of that attendance made no reference to the road traffic accident or the injuries allegedly resulting from it. Martin Spencer J characterised this as a "deafening silence": see paragraph 6.

Two weeks after the quad bike incident Mr Pegg was discharged from the physiotherapy that had been arranged by his solicitors, and a month after that he attended an appointment with the medico-legal expert in his personal injury claim. He told the expert that his physiotherapy was ongoing, and that there was no relevant past history of musculoskeletal problems. He did not mention the quad bike incident or the attendance at hospital following it. The expert gave a prognosis of recovery within 6 months from all the alleged injuries.

The Particulars of Claim pleaded that the accident had caused Mr Pegg injury to, inter alia, his neck and left knee, and relied on the medical expert's report and the prognosis for recovery contained within it.

Subsequent disclosure of Mr Pegg's medical notes showed he had a long-standing problem with his knees and had also reported low back pain less than a year before the accident.

The Claimant's witness statement made no reference to the previous problems with his knees and nor did it mention the quad bike incident. He relied on the medical expert's report and prognosis for recovery.

Trial

When confronted with the various inconsistencies at trial Mr Pegg changed his evidence. He said he had recovered from his alleged neck injury within 3 to 4 weeks and could not say when he had recovered from his alleged knee injury because of his pre-existing problems.

The trial judge found that he could not say that Mr Pegg's failure to disclose his previous medical history of knee and back to the medical expert was dishonest, because he could not be sure precisely what question Mr Pegg was asked by the medical expert going to that issue. However, the judge did find that the Mr Pegg would have known that it was relevant to disclose the quad bike incident but did not do so. Because the medical expert was unaware of Mr Pegg's previous history of knee problems and the quad bike incident, the judge found that Mr Pegg could not rely on that report as probative of his alleged injuries but he did not find Mr Pegg to have been fundamental dishonest.

The appeal

The defendant appealed on the basis that the judge had failed to follow through his reasoning to what should have been its logical conclusion, namely that Mr Pegg had been fundamentally dishonest.

Martin Spencer J cited from his own judgment in *Molodi* as to the problems of fraudulent and exaggerated claims, making clear that although those remarks were made in the context of alleged whiplash injury, they apply to personal injury claims generally.

Applying those remarks to Mr Pegg's case, he concluded that there were factors which pointed "strongly, if not inexorably" to the conclusion that Mr Pegg had been dishonest in the presentation of his injuries to the medical expert and to the court, and which the trial judge failed to deal with either adequately or at all. The factors he cited were:

a. Mr Pegg's failure to seek medical assistance of his volition for the injuries allegedly suffered in the accident which "should immediately have raised at least a suspicion in the mind of the judge".
b. The absence of reference to the accident-related injuries when Mr Pegg attended hospital for the quad bike incident – the first "deafening silence".
c. The failure to mention the quad bike incident to the medical expert; the second "deafening silence".
d. Mr Pegg's "positive lies" to the medical expert about still undergoing physiotherapy and experiencing neck symptoms at the time of their meeting when the objective evidence showed he had been discharged from physiotherapy and his own evidence at trial was that he had recovered from his neck injuries by that point.
e. Mr Pegg's reliance on the medical expert's prognosis period in his Particulars of Claim and Witness Statement when he must have known that that period was not accurate.

Having regard to those factors, concluded the appeal court, "no judge could reasonably have failed to come to the conclusion that the claim for damages as presented by [Mr Pegg] was a fundamentally dishonest one, perpetrated by fundamentally dishonest accounts to the only medical expert and in the various court documents".

Analysis

There is widespread awareness of the problem of fraudulent and exaggerated claims, and there have been warnings from the higher courts (such as in *Molodi*) against taking too benevolent approach to claimants who present claims riddled with inconsistencies. But there still seems a reluctance among some judges to find a claim dishonest, even when the evidence clearly points that way; or, to put it another way, there seems an enduring tendency to try to force the square peg of a dishonest claim through the round hole of an honest one.

Pegg will, hopeful, stiffen the sinews of a judge faced with a dishonest claim. The suggestion that a failure to seek medical attention until prompted by solicitors should raise "at least a suspicion" is also likely to be cited frequently, as is the phrase "deafening silence" to describe claimants who fail to mention obviously relevant matters to a medical expert or in witness statements.

The other lesson that should be drawn from *Pegg* is that appeals "on the facts" can succeed. Where a judge has failed to deal with relevant factors or their implications and, as a result, has failed to find a claim dishonest, then defendants should give serious consideration to an appeal.

CLAIMANT FAILS TO CIRCUMVENT A LIMITATION DEFENCE UPON RESTORATION OF THE DEFENDANT COMPANY – *HOLMES V S&B CONCRETE LTD* [2020] EWHC 2277 (QB).

CHRISTOPHER PASK

Mr Justice Martin Spencer has concluded that a claimant in a personal injury claim cannot rely upon the rule that limitation for the purposes of his claim was suspended when the defendant company was wound up.

This was in circumstances where the claim is brought more than three years after the cause of action accrued, or the date of knowledge (if later), but where it would not be equitable to allow the claim to proceed by virtue of the discretion in section 33 of the Limitation Act 1980.

Background

The Claimant was employed by the Defendant between approximately 1986 and 1993 at their factory premises in Barnsley. His claim was for alleged Noise Induced Hearing Loss ("NIHL") which was supported by a medical report dated 14 November 2018.

The Defendant company was dissolved on 19 August 1995 following a voluntary winding-up pursuant to section 106 of the Insolvency Act 1986.

As part of his claim, the Claimant pleaded that his date of knowledge within the meaning of the Limitation Act 1980 occurred less than three years prior to the issue of the proceedings on 30 May 2018. Alternatively, if it was established that his date of knowledge was earlier, it would be equitable for the court to exercise itsvdiscretion pursuant to section 33 of the Limitation Act 1980.

The Claimant subsequently applied for and obtained an order restoring the defendant company to the register, so that he could pursue the Defendant company with his claim being satisfied by the Defendants employers liability insurer at the time. That application was served on the registrar of companies but not the relevant historic insurer.

Effect of Restoration and the Claimants Argument

Pursuant to section 1032 of the Companies Act 2006, upon the restoration of a company, it is deemed to have continued in existence as if it had not been dissolved or struck off the register. The effect, therefore, is that the Defendant company is returned to the position it was in immediately prior to its dissolution.

In this case, the Defendant company was in creditors voluntary liquidation since at least 17 May 1995.

The Claimant relied on the rule established by *Financial Services Compensation Scheme Limited v Larnell (Insurances) Limited (in liquidation)* [2005] EWCA Civ 1408, that time does not run for limitation purposes beyond the date when liquidation commences.

Therefore, the Claimant said, if the claim was not time-barred at the commencement of the liquidation, it does not become time-barred by the passage of time thereafter; for the claim to be time-barred the Claimant's date of knowledge would have needed to be before 17 May 1992 (three years before the commencement of the liquidation).

At first instance, HHJ Owen QC decided against the Claimant on the date of knowledge issue and refused to exercise the section 33 discretion. He subsequently dismissed the claim on the basis that the Defendant company should not have been restored until the limitation issues had been resolved, or conditions should have been imposed in such restoration (pursuant to *Smith v White Knight Laundry Ltd* [2001] EWCA Cave 660).

Appeal

The Claimant maintained that the judge at first instance had been wrong to distinguish his case from *Financial Services*.

The Defendant submitted that the power to restore a company to the Register is a discretionary one and should not be exercised for the purpose of allowing a

claim for damages for personal injury if it appears that the claim would fail by reason of a limitation enactment and the question of limitation is in dispute. The company should not be restored until those issues had been decided.

Further, the Claimants claim was a case involving compulsory employers' liability insurance well within the then minimum limit of indemnity (then £2,000,000) and the claim was thus "outside the liquidation" so that time had not ceased to run before the claim form was issued.

Further, the claim should be distinguished from *Financial Services* because:

i) The Claimants in the Financial Services case had "knowledge" of their cause of action for the purposes of sections 14A and 14B of the Limitation Act in 1997 which was before the company was wound up in 2000;

ii) The Claimants in Financial Services had put in a proof of debt in August 2001 which had neither been admitted nor rejected by the liquidator;

iii) By contrast, the Claimant's date of knowledge in the present case was long after the Defendant company had been wound up and although he may have had an accrued cause of action for the injury to his hearing, he was unaware of it and therefore could not, practically, have lodged a claim with the liquidator then.

iv) In *Financial Services*, the policy of liability insurance to which the Claimant intended to have recourse had a limit of indemnity of £250,000 while the claim itself amounted to £607,000;

v) By contrast, the claim in the present case relates to employers' liability in respect of which, at all material times, the Defendant was required to have compulsory insurance for which the minimum level of insurance required was £2,000,000;

vi) In those circumstances the factors relied upon by the court in *Financial Services* which were considered to make it impossible to see the claim as being one made "outside the liquidation" and not directed at property within the statutory trusts had no application to the present case.

Judgment on Appeal

Martin Spencer J upheld the dismissal and distinguished the case from *Financial Services*. At [20] of his judgment he concludes:

> *"In the vast majority of personal injury cases, the liability of the insurance company will fall well within the statutory minimum level of insurance of £2,000,000. Thus there will generally be no difficulty in satisfying the full claim from the funds made available by the insurance company. In that case, the claim can, in my judgment, be seen to be "outside the liquidation" and therefore to be distinguished from the position in Financial Services."*

In the rare case where the liability of the insurance company may not be sufficient to satisfy the claim it could be a condition of the order restoring the company to the register that any claim made by the claimant against the company is to be limited to the liability of the insurer pursuant to the policy. The claim can therefore be kept outside the liquidation and distinct from the situation in *Financial Services*.

This was said to be a desirable outcome and would avoid claimants receiving an unexpected windfall in cases where the date of knowledge was more than three years before the issue of proceedings and it was inequitable to exercise the section 33 discretion.

Finally, Martin Spencer J noted that it was unfortunate that the Defendant company was restored to the register without notice of the application being given to the Company's insurers, the ultimate target for the Claimant. At present, there is no requirement to give notice of an application to restore to anyone other than the Registrar of Companies, something the judge recommended the Rules Committee consider.

Insurers will need to be mindful that applications to set aside the order for restoration may need to be made but going forward, claimants bringing personal injury claims will not generally be able to rely upon the retrospective effect of company restoration to avoid a limitation defence.